UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
NICHOLAS H. POLITAN
JUDGE

MARTIN LUTHER KING JR.
FEDERAL BUILDING & U.S. COURTHOUSE
50 WALNUT ST., ROOM 5076
P.O. BOX 999
NEWARK, N.J. 07101-0999

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LETTER OPINION
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Richard C. Yeskoo, Esq.
FABRICANT & YESKOO
86 Hudson Street
Hoboken, NJ 07030
Attorneys for Plaintiff Combined Companies, Inc.

H. Curtis Meanor, Esq.
Lawrence S. Coven, Esq.
PODVEY, SACHS, MEANOR, CATENACCI, HILDNER & COCOZIELLO
Legal Center
One Riverfront Plaza
Newark, NJ 07102

Charles H. Helein, Esq.
HELEIN & WAYSDORF, P.C.
1850 M Street, N.W.
Suite 550
Washington, DC 20036
Attorneys for Winback & Conserve Program, Inc.; One Stop Financial, Inc.; Group Discounts, Inc.; 800 Discounts, Inc.; and Public Service Enterprises of Pennsylvania, Inc.

Frederick L. Whitmer, Esq.
PITNEY, HARDIN, KIPP & SZUCH
P O Box 1945
Morristown, NJ 07962

Charles W. Douglas, Esq.
SIDLEY & AUSTIN
One First National Bank Plaza
Chicago, Il. 60603

Edward R. Barillari, Esq.
AT&T Corp.
295 North Maple Avenue
Basking Ridge, NJ 07962
Attorneys for Defendant AT&T Corp.

Re: Combined Companies, Inc., et al
v. AT&T Corp.
Civil Action No. 95-908 (NHP)

Dear Counsel:

This matter comes before the Court on a motion for preliminary injunction by plaintiffs Winback & Conserve Program, Inc. ("Winback"), Group Discounts, Inc. ("GDI"), One Stop Financial, Inc. ("One Stop"), and 800 Discounts, Inc. ("800 Inc.") (collectively "the Inga companies") and Combined Companies Inc. ("CCI")[1] pursuant to section 406 of the Communications Act ("the Act"), 28 U.S.C. § 406. The substance of plaintiffs' claims as set forth in their complaint is that defendant AT&T Corp. ("AT&T")[2] has violated the Act by effectively withholding from them certain long-distance services as a means of hampering their efforts to transfer and consolidate their long distance service plans to obtain better rates. Having fully reviewed the multitudinous submissions of the parties and having witnessed the barbed exchanges between them, both in Court submissions and at the two-day hearing in this matter, the Court finds that

[1] The Complaint also named Public Service Enterprises of Pennsylvania, Inc. ("PSE") as a plaintiff in this action, but PSE has since been dismissed from the case without prejudice.

[2] AT&T is the dominant common carrier of telecommunications services in the United States, and is regulated by the Act, 47 U.S.C. §§ 151, et seq., and the policies of the Federal Communications Commission ("FCC"). AT&T's relationship with plaintiffs and PSE is thus governed by the Act.

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plaintiffs' motion for a preliminary injunction shall be granted in part and denied in part.

The facts underlying this dispute are as follows. The Inga companies and CCI are engaged in the telecommunications business as "aggregators" of AT&T tariffed telecommunications services or "800" services, also known as Inbound Wide Area Telephone Services ("IWATS"). Aggregation involves the resale of these 800 services to small businesses which do not have any direct affiliation with AT&T, and which can secure better IWATS rates by joining programs or "plans" run by the aggregators than they could obtain individually. The aggregators maintain these plans subject to contract with AT&T (being known as "customers of record"), and by virtue of the volume of business they can produce, they obtain discounts on their plans and pass some of these savings on to their clients (known as "end users").

The savings obtained by the aggregators/customers of record and the manner in which the end user benefits from them is somewhat elaborate, but is best illustrated as follows. The aggregators' contracts with AT&T for IWATS exist pursuant to AT&T's tariffed Customer Specific Term Plan II ("CSTP II") as set forth in AT&T F.C.C. Tariff No. 2.[3] CSTP II is a volume discount plan under which the aggregators have a maximum discount of 23% on 800 calls. This discount combines with AT&T's tariffed Revenue Volume Pricing Plan ("RVPP") discount of 5% to constitute

[3] Plaintiffs' agreements with AT&T are for CSTP II plans under Tariff F.C.C. No. 2.

an entire discount for the aggregators of 28%. The aggregators in turn pass on one of four secondary discounts (15%, 17 1/2%, 20%, or 23%) to their end users -- discounts which those small businesses could not secure on their own due to their low IWATS volume.

Under the arrangement agreed upon between AT&T and plaintiffs, AT&T does not bill its customer of record (aggregator) for the volume of 800 calls the aggregator produces or procures, but instead bills the end user directly, calculating into the bill that secondary discount which the aggregator has allotted the end user in question. AT&T then pays to the aggregator the difference between the aggregator's CSTP II/RVPP discount and that percentage discount allotted the end user.[4] The sum remitted by AT&T to the aggregator constitutes the aggregator's income, from which it derives its operating costs and profits.

PSE (formerly a party to this action) is also involved in the telecommunications resale business, although its arrangement with both AT&T and its own end users involves more favorable terms than those enjoyed by plaintiffs. PSE's business involves the resale of outbound services as well as IWATS, and a combination of both. Like plaintiffs, PSE is an aggregator, but pursuant to contract with AT&T can combine outbound calling services with its IWATS resale operations, and thus -- presumably

[4] Any bad debt or unpaid bills created by an aggregator's end users will be deducted from that aggregator's RVPP discount return by AT&T before remission of the CSTP II/RVPP return.

-- can cater more to the overall needs of the small businesses it services.

PSE's relationship with AT&T is governed by AT&T's Contract Tariff F.C.C. No. 516 ("KT-516"). Under KT-516, PSE enjoys the same CSTP II/RVPP discounts of 28% to which plaintiffs are entitled, but PSE also receives and additional 38% discount under KT-516 and other offerings from AT&T. PSE in turn passes on discounts to its end users, and because of the larger overall discount it enjoys, PSE can offer more attractive discounts to these end users than can plaintiffs. As under the arrangement with plaintiffs, AT&T bills PSE's end users directly, subtracting from the bill that amount of discount allotted by PSE to each individual end user. In turn, AT&T remits to PSE the difference between the latter's 66% overall discount and that passed on to the end user.[5]

Plaintiffs and PSI have obtained their status as resellers by making commitments to AT&T that they will consume certain amounts or volumes of AT&T's services over the contract period. As customers of record, the aggregators are lawfully responsible for any deficiency in usage. Thus, they aggregate their commitment out to small businesses which need the service but cannot obtain the best deal directly with the common carrier because of their low volume of service usage. If the end users fail to pay their bills or if there is any shortfall in usage

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[5] As in the plaintiffs' case, AT&T deducts from the RVPP discount/rebate remitted to PSE any bad debt or unpaid bills accrued by its end users.

under an aggregator's plan, that aggregator is liable to AT&T for the deficiency. For instance, under the CSTP II agreements, the discount rates available to plaintiffs are contingent upon high annual usage commitments. If such commitments are not met, the aggregator is obligated to pay "shortfall" charges, which amount to the deficiency in usage over the contract term. Shortfall charges are retroactively imposed. If a plan is prematurely terminated, the aggregator is liable for a prospective "termination" charge for the prospective deficiency under the agreement. These shortfall and termination charges are calculated on contract-specific formulae, not relevant to the instant determination.

The tariff under which plaintiffs operate, Tariff F.C.C. No. 2, makes provision for the transfer or assignment of tariff plans. Section 2.1.8 of Tariff F.C.C. No. 2 allows transfer of plans by: (1) the customer of record requesting that AT&T transfer its plan to a new customer; (2) the new customer assuming all the obligations of the former customer of record, including all outstanding indebtedness as well as "the unexpired portion of any applicable minimum period(s)[;]" and (3) AT&T acknowledging the transfer in writing within fifteen (15) days of receipt of notification. After such transfer, the former customer of record remains jointly and severally liable with the new customer for all obligations existent at the time of transfer. See Tariff F.C.C. No. 2, § 2.1.8. The manner in which such a transfer is carried out is by the submission of a Transfer of Service Agreement and Notification form ("TSA"), executed by both parties to the transfer, to AT&T.

On December 16, 1994, the Inga companies executed certain TSA's transferring to CCI a number of CSTP II/RVPP plans, namely Plans No.s 1351, 1583, 2430, 2828, 2829, 3124, 3468, 3524, and 3663. In response to AT&T's request, CCI resubmitted these TSA's on December 22, 1994; and on receiving no response to the later submission, CCI again submitted several of the TSA's on December 30, 1994. On that day, December 30, 1994, CCI received written confirmation of two of the submitted TSA's, namely, those for Plans No.s 2829 and 3124. Thereafter, CCI received "welcoming calls" from AT&T. Neither the Inga companies nor CCI received any written notice of non-acceptance by AT&T of their TSA's within fifteen days of December 16, 1994, the date of the original submission of the TSA's. Larry C. Shipp's affidavit states that, on the contrary, AT&T's conduct led CCI to believe it was now the customer of record on all of the transferred Inga companies' plans. For instance, CCI obtained "credits" for promotional monies owed to the former customer of record (one of the Inga companies), and on January 30, 1995, received checks from AT&T made payable to CCI in excess of $1,000,000.00.

On January 24, 1995, AT&T notified CCI that none of the TSA's -- including those for Plans No.s 2829 and 3124 -- would be approved by AT&T until CCI submitted a security deposit of $13,540,000.00. This demand for a deposit was made in light of the fact that CCI was a "new" company without any credit rating by which AT&T could consider its service plans secure.[6] Indeed, CCI was an inoperative company prior to the transfer of the Inga companies' plans. In demanding this deposit, AT&T was exercising its right under Tariff F.C.C. No. 2, § 2.5.8,[7] allowing AT&T to require a deposit of up to three months of the transferee's expected revenue commitment.[8] It is AT&T's practice to determine the need for a security deposit by evaluating the new customer's credit rating with Dun & Bradstreet. When that credit history is bad or non-existent, AT&T claims it has the right,

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[6] AT&T based its demand for the deposit on its need "to guarantee payment of the charges" for the transferred plans and on the fact that CCI was "a start-up company without an established credit history and ha[d] made a sizeable revenue commitment by ordering [the plans]." Shipp Affidavit at ¶ 20. CCI objects to this characterization, asserting that its subsidiaries, Global Long Distance Marketing, Inc. and National Telesis, Inc. had long been AT&T aggregators with good reputations and credit histories with AT&T. As such, CCI's parentage of these companies should have, in CCI's view, weighed in its favor in any credit-worthiness analysis.

[7] Section 2.5.8 of the tariff provides, in pertinent part:

> Deposits - The following deposit provisions are applicable to WATS.
>
> A. To safeguard its interests, the Company will only require a Customer which has a proven history of late payments to the Company or whose financial responsibility is not a matter of record, to make a deposit to be held as a guarantee for the payment of charges. . . . The deposit will not exceed an amount equal to three months estimated usage charges and access line charges associated with AT&T 800 Service . . . .

Tariff F.C.C. No. 2 § 2.5.8.

[8] The annual revenue commitment transferred with the Inga companies' plans to CCI was in excess of fifty four million dollars.

under Tariff F.C.C. No. 2 § 2.5.8 to demand a security deposit.

One of the two prongs of plaintiffs' case against AT&T is the argument that AT&T had no right to demand the security deposit after it had acknowledged CCI as the new customer of record on the transferred plan by failure to dispute the transfer within fifteen days and by its communications with CCI in January of 1995. This prong of plaintiffs' case alleges that AT&T violated section 201(a) of the Act by refusing "service" to plaintiffs by, inter alia, failing to acknowledge the Inga companies/CCI transfers.

Moreover, plaintiffs allege that AT&T has further violated the Act by failing to comply with the plain terms of its own tariff, namely section 2.1.8, which makes no reference to any deposit requirement and contains no cross-reference to that section of the tariff which allows deposit demands, namely section 2.5.8. Additionally, plaintiffs allege that AT&T's danger of losing on the Inga companies' commitments was less after the Inga companies/CCI transfer than before. For instance, plaintiffs point out that under the tariff rule of transfer: (i) AT&T had security in the fact that it, AT&T, bills the end users directly; (ii) AT&T could pursue CCI for the going-forward non-payments arising from the transferred plans, while having recourse to the Inga companies for all pre-transfer non-payments; and (iii) that AT&T could look to CCI and/or the Inga companies for shortfalls in the minimum annual commitment levels under the plans.

Plaintiffs' second attack on AT&T's handling of their situation is based on a second request for transfer, this time a transfer of the service on the plans acquired by CCI from the Inga companies. This second transfer was attempted because CCI failed to obtain from AT&T a KT-516 similar to that which PSE has.

On January 13, 1995, PSE and CCI jointly executed and submitted written orders to AT&T to transfer the 800 traffic under the plans CCI had obtained from the Inga companies to the credit of PSE. Only the traffic was to be transferred, not the plans themselves. In this way, CCI would maintain control over the plans while at the same time benefitting from the much larger discounts enjoyed by PSE under KT-516. AT&T refused to accept this second transfer on the ground that CCI was not the customer of record on the plans at issue, and thus could not transfer the traffic under those plans to PSE. AT&T was further troubled by the fact that if only the traffic on the plans and not the plans themselves were transferred to PSE, the liability for shortfall and termination charges attendant thereto would then be vested in CCI: an empty shell in AT&T's view. AT&T regarded CCI as an empty shell because of the credit check it had conducted and because of the fact that CCI had, in AT&T's view, no assets against which any judgment for deficiency might later be levied. Without the revenue generated by the traffic under the plans, CCI would have no income and no means of backing the responsibilities it maintained after the CCI/PSE transfer of traffic.

It is CCI's position that AT&T's reasons for rejecting the CCI/PSE transfer of traffic are illusory and that the true motivation behind AT&T's conduct is a desire to prevent or destroy competition in the IWATS market. For instance, all the plaintiffs make much ado about their claim that, in reality, the threat of termination and shortfall liability is non-existent with regard to the plans at issue here. Because AT&T bills the end users directly and can deduct any unpaid debt incurred by end users from the RVPP discount of the aggregator, plaintiffs argue, there is no danger of shortfall. Likewise, the danger of termination charges is also a fiction, plaintiffs suggest, because of the many elaborate ways in which one can essentially refinance a plan before any termination charges actually accrue. For the purposes of the instant determination, a detailed scrutiny of such ruses or acceptable restructuring devices, whichever they be, is not necessary. Suffice it to say that, with regard to pre-June, 1994 plans, methods exist for defraying or erasing liability on one plan by transferring or subsuming outstanding commitments into new and "better" plans pursuant to AT&T's own tariff.

Plaintiffs use the fact of the second transfer (CCI/PSE) to further reinforce their claim that AT&T violated the Act by refusing to recognize the first transfer (Inga companies/CCI). Plaintiffs argue that, even if AT&T did have reservations about CCI's credit rating or lack of payment history under section 2.5.8 of Tariff F.C.C. No. 2, such concerns ought to have been erased by the second transfer to PSE, a long-time and credit-worthy client of AT&T's. AT&T replies to that assertion by arguing that since only the traffic on the plans was passed to PSE, and not the plans themselves with their attendant liabilities, PSE's standing and credit-worthiness was irrelevant to the potential for shortfall and termination liability. Absent an acceptance by PSE of the Inga companies' commitments on the plans, AT&T would not authorize the CCI/PSE transfer.

On February 16, 1995, AT&T filed Tariff Transmittal 8179 with the FCC, instituting an administrative action wherein AT&T seeks to make explicit the implicit right AT&T believes it has under Tariff F.C.C. No. 2 to stop the transfers at issue here.[9] Plaintiffs in the instant case count among those who have opposed AT&T's proposed tariff clarification before the FCC. In that proceeding, as in the matter at bar, plaintiffs contest AT&T's right to demand security for transfers and to demand that when traffic under a plan is transferred, the plan and its attendant commitments must follow.

Primary Jurisdiction

As an initial matter, the Court shall address AT&T's request that this action be dismissed under the doctrine of primary

[9] AT&T believes these transfers are an effort by the principal of the Inga companies to evade annual commitments to AT&T in such a manner as to escape liability for any shortfalls and termination charges which might otherwise arise on those plans. This effort at denuding himself of the plans was, in AT&T's view, an attempt at "obtaining the benefits of a transfer of service [while] at the same time depriv[ing] AT&T of the commitments made to obtain that service." Whitmer Cert., ¶ 2.

jurisdiction. AT&T contends that this entire action concerns the scope of AT&T's duties and rights under its tariff and the Act and is within the exclusive ken of the FCC.

Primary jurisdiction is a legal doctrine well-established, albeit sometimes confused, in those areas of law where the courts and regulating agencies share authority. The Tenth Circuit has recently described the doctrine comprehensively:

> "Primary jurisdiction is invoked in situations where the courts have jurisdiction over the claim from the very outset but it is likely that the case will require resolution of issues which, under a regulatory scheme, have been placed in the hands of an administrative body." [Citation omitted.] Under that doctrine, "the judicial process is suspended pending referral of the issues to the administrative body for its views." [Citations omitted.]

Mical Communications, Inc. v. Sprint Telemedia, 1 F.3d 1031, 1038 (10th Cir. 1993). See also Richman Bros. Records v. U.S. Sprint, 953 F.2d 1431, 1435 n.2 (3d Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 3056 (1992).

The Mical court listed the various factors considered by courts in deciding the applicability of the primary jurisdiction doctrine in specific cases. Some courts examine whether issues of fact inherent in the case are within or without the conventional experience of judges; whether the exercise of administrative discretion is required to resolve issues of fact in the case; and whether the area of business in which the dispute arose is entrusted to a particular agency whose resolution of the matter might best afford uniformity and consistency of conclusion. Other courts focus on whether the need for speedy judicial resolution of the issue outweighs the benefit of obtaining the agency's determination on the matter. Within this last area of concern courts consider the following balancing factors: "'how agency action will aid the litigation; whether the litigation involves conduct requiring continuing supervision by the agency; whether the issues to be litigated are unique to regulated industries; and whether proceedings already are pending before the agency.'" Id. (quoting, inter alia, Marshall v. El Paso Natural Gas Co., 874 F.2d 1373, 1376-77 (10th Cir. 1989); Gulf States Utils. Co. v. Alabama Power Co., 824 F.2d 1465, 1473 (5th Cir. 1987)). The court must be conscious of the danger of inconsistent rulings between itself and the agency conferred by Congress with the authority to govern the area of business or industry at issue. Id. The Mical court resolved the primary jurisdiction issue in favor of staying the action in the District Court pending a determination by the FCC as to whether the Act governed a common carrier's duty as to billing and collection for subscriber's "romance talk" 900 number services. Id. at 1040.[10]

The instant case involves the construction of a tariff, namely, Tariff F.C.C. No. 2, and certain sections thereof.

[10] The Mical court was persuaded, at least in part, by the fact that the precise issue before the court in that case was at the same time pending before the FCC, and that the was "therefore a real possibility that a decision by th[e] court prior to the FCC's response to the [pending] petition would result in conflicting decisions[.]" Id., 1 F.3d at 1040.

Specifically, the Court is called upon to decide whether section 2.1.8 of the tariff allows two separate kinds of transfer. As to both transfers which plaintiffs seek to have enforced over AT&T's objection, section 2.1.8 appears controlling. It is this Court's finding -- a matter akin to contract construction, well within the conventional experience of the Court -- that tariff section 2.1.8 permits the transfer and manner of transfer engaged in by the Inga companies and CCI in December of 1994. See infra. However, as to the CCI/PSE transfer, the issue hinges on whether section 2.1.8 permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction.

The second issue before the Court, therefore, involves the construction of a tariff provision which is not clear on its face as to what amount of fractionalizing, if any, of plans it allows. Such a determination, perforce, requires the Court to decide whether a plan and its attendant obligations under a tariff may be separated from its traffic -- when that traffic might well constitute the only guarantee available that the plan's obligations will be honored.

Based on the analysis, supra, of the propriety of applying the doctrine of primary jurisdiction in cases wherein the Court may leave to regulating agencies those questions best decided by them, this Court finds that the second issue before it -- the CCI/PSE transfer -- should be determined by the FCC. This is so because such a question, being inherently within the realm of the

Communications Act and its regulatory mechanisms, is not within the conventional experience of trial courts. This issue turns particularly on a "practice included [or not included] in a tariff filed with [the FCC]" and "involves technical questions of fact [-- such as the intent of the tariff drafter --] uniquely within the expertise and experience of [the FCC.]" Richman Bros. Records, 953 F.2d at 1435 n.3 (citations omitted). Moreover, the proper application of administrative discretion to that issue will best protect against inconsistencies of outcome, while at the same time affording the parties some certainty regarding the proper construction of tariffs -- the life-blood of all parties to this action.

A final determination by the FCC of this issue will clear a path for the parties to proceed in their business relationships ith each other, and lend predictability to their actions. The Court is also persuaded by the fact that this very issue is presently pending determination by the FCC.[11] As such, the

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[11] While the Court defers to the FCC's primary jurisdiction on the second transfer, the Court notes that AT&T has raised both transfers in its Tariff Transmittal 8179 to the FCC. This obvious attempt to create primary jurisdiction in the FCC on both transfers fails, however, to the extent that the first transfer nd its adjudication are well within the ken of this Court and ts jurisdiction as conferred by section 406 of the Act. While it may well be that AT&T is unhappy with its existing tariffs, that displeasure is not at issue in this case. In regard to the first transfer, as will be shown, the Court is asked to construe the clear and unambiguous language of AT&T F.C.C. Tariff No. 2 § 2.1.8. Construction of such clear language does not call for FCC expertise. Should AT&T wish to revise the language of section 2.1.8 or to 'clarify' it in such a way as to change the manner in ich transfers may be conducted under the tariff, it is free to take whatever steps it chooses -- and to which it may be entitled -- before the FCC. Whether the FCC opts to change, clarify,

Court shall express no opinion as to this issue and shall refer it for appropriate resolution to the FCC. See MCI Communications Corp. v. Amer. Tel. & Tel. Co., 496 F.2d 214 (3d Cir. 1974).

Section 406 of the Act

Plaintiffs assert that this Court has jurisdiction over this entire matter and has the power to grant a preliminary injunction under 47 U.S.C. § 406. The Court is satisfied that section 406 does permit parties deprived of long distance service to come before the district court and seek a writ of peremptory mandamus, even in the face of an outstanding question of fact as to the appropriate compensation to the carrier for the service. 47 U.S.C. § 406. Although Fed.R.Civ.P. 81(b) abolished the ancient writ of mandamus, the modern vehicle of injunctive relief satisfactorily fills the breach.

It is well-established that in 47 U.S.C. § 406 actions for relief, the traditional requirements for the issuance of injunctive relief do not apply. For instance, irreparable harm need not be shown where violation of the statute in itself provides a statutory right to injunctive relief, as does section 406 of the Act. Mical, supra, 1 F.3d at 1035 (citing and quoting CSX Transp. v. Board of Equalization, 964 F.2d 548, 551 (6th Cir. 1992); Burlington Northern R.R. Co. v. Bair, 957 F.2d 599, 601 (8th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 69 (1992);

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modify or amend the language of that section is of no moment to the instant determination. This matter involves a simple interpretation and application of the language of section 2.1.8 -- as it exists now and at the time of the Inga companies/CCI transfer -- and nothing more.

Illinois Bell Tel. Co. v. Commerce Comm'n, 740 F.2d 566, 571 (7th Cir. 1984); Gresham v. Windrush Partners, Ltd., 730 F.2d 1417, 1423 (11th Cir.), cert. denied, 469 U.S. 882 (1984); Atchison, Topeka and Santa Fe Ry. v. Lennen, 640 F.2d 255, 259 (10th Cir. 1981)(per curiam)). Rather than establish the traditional elements required for injunctive relief, therefore, plaintiffs in the instant matter can satisfy section 406 of the Act and obtain injunctive relief by showing a clear and equivocal right to that which they request. Mical, 1 F.3d at 1036.

In light of the fact, therefore, that redress is available for deprivation of services, the question then becomes whether plaintiffs here have been deprived of services by AT&T in violation of the Act.

Section 202(b) of the Act provides that "services" under the Act "include charges for, or services in connection with, the use of common carrier lines of communication . . . ." 47 U.S.C. § 202(b). Plaintiffs in the instant case are aggregators; resellers of telecommunication services to end users. AT&T suggests that since no end users have been deprived of those services in any way, and that the provision of service to these end users has not been hampered, section 406 of the Act does not authorize plaintiffs to seek interim relief before this Court. Based on the definition of "services" in section 202 of the Act, however, the Court must find that the issues herein involve "services in connection with" the provision of IWATS services to end users. It cannot be denied that AT&T's conduct has in some way affected plaintiffs' provision of "services" to end users, or at least the manner in which plaintiffs opt to provide those services under the tariff.[12] As such, plaintiffs satisfy the "service" prerequisites for federal district court intervention under the Act.

Plaintiffs allege that AT&T violated the Act in refusing to "furnish [] communication service[s] upon reasonable request therefor . . . ." 47 U.S.C. § 201(a). In disputing the manner in which the Inga companies transferred their plans to CCI and in demanding that a security deposit of more than thirteen million dollars be paid before such a transfer would be authorized, plaintiffs argue, AT&T violated its duty to provide requested services -- even under protest -- "rather than refusing to meet a questionable obligation until after the complaint or litigation is resolved." <u>In the Matter of Hawaiian Telephone Company</u>, 78 F.C.C.2d 1062, 1065 (1980). <u>Compare</u> 47 U.S.C. § 406 (writ of mandamus shall issue despite the existence of issues of fact).

The only issue to be decided by this Court is whether the Inga companies and CCI had a right to transfer plans between them

[12] Because the issues implicated in this case center on the rights and obligations of the parties pursuant to AT&T F.C.C. Tariff No. 2, and the provision of services thereunder, the Court need not engage in exhaustive analysis of the "service" issue. <u>See e.g. MCI Telecommunications Corp. v. Graham</u>, 7 F.3d 477 (6th Cir. 1993) (tariffs approved by the FCC become law in themselves and create their own obligations, beyond the realm of merely contractual relations); <u>Mical</u>, <u>supra</u>, 1 F.3d at 1036-38 (treating of whether certain billing and collections were "services" under the Act); <u>MCI Telecommunications v. Garden State Inv.</u>, 981 F.2d 385 (8th Cir. 1992) (cause of action arising from tariff is not a contract claim, but instead it raises a federal question).

in the manner in which they did. The Court finds that the transfer was conducted in compliance with Tariff F.C.C. No. 2 § 2.1.8, and by use of the appropriate TSA's authorized by AT&T. The parties properly executed the TSA's and did not receive any notification of disapproval within the tariff-mandated fifteen day period, and came to believe -- justifiably -- that the transfer had been approved and that CCI was the new customer of record on the plans. Indeed, correspondence from AT&T in writing and in the form of telephone "welcoming" calls, in conjunction with "credits" and checks in the amount of more than one million dollars, all led CCI to believe it was officially the new customer of record on the transferred plans.

The plain language of section 2.1.8 of the tariff -- governing the transfer of plans -- makes no reference to any requirement that deposits be posted before plan transfers may be authorized. Tariff F.C.C. No. 2 § 2.1.8. While AT&T stresses that a lack of assets and credit history can justify its demand that a new customer post a security deposit under section 2.5.8 of the tariff, it fails to suggest how any deposit requirement can be read into section 2.1.8.

If AT&T wished to preserve the right to demand a deposit for plan transfers per section 2.5.8, it should have conditioned section 2.1.8 upon satisfaction of section 2.5.8. Because no provision for deposit demands is contained in the section of the tariff governing transfer of plans, and because the Inga companies and CCI followed the transfer section of the tariff to the letter, they ought not now be forced to deal with a unilateral change of the rules by AT&T. Moreover, AT&T's elliptical justification for its deposit demand is undermined by the omission in its tariff language of any cross-reference between sections 2.1.8 and 2.5.8. The lack of any such cross-reference and the clear message to be drawn therefrom is best appreciated by a cursory glance at other provisions of section two of the tariff which clearly shows cross-references to pertinent sections. See e.g. Tariff F.C.C. No. 2 §§ 2.1.2; 2.2.6.C and D; 2.4.1; 2.5.9. Plaintiffs cannot be held to construe the section governing transfers under the tariff as meaning that which it does not. Words mean what they say. Rules should not be changed in the middle of the game, and certainly not without notice.

Based on the unambiguous language of the transfer section, it is clear and unequivocal that the Inga companies/CCI transfer satisfied Tariff F.C.C. No. 2 § 2.1.8. Based on that clear language, therefore, plaintiffs CCI and the Inga companies have established their right to have the transfer of CSTP II plans as between them recognized and authorized by AT&T.

The Court is therefore satisfied that plaintiffs have established their right to a preliminary injunction ordering AT&T to provide CCI full service on the CSTP II Plan No.s 1351, 1583, 2430, 2828, 2829, 3124, 3468, 3524, and 3663, as provided for in the TSA's executed and submitted by the Inga companies and CCI on December 16, 1994.

SECURITY

Having concluded that a Preliminary Injunction should issue in this case, the Court must determine the amount of security, if any, to order. Section 406 of the Act provides in part:

> if any question of fact as to the proper compensation to the carrier for the service to be enforced by the writ is raised by the pleadings, the writ . . . may issue . . . upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper . . . .

47 U.S.C. § 406.

Under the literal language of section 406 of the Act, as applied to the instant case, the Court need not address the question of proper compensation to AT&T for use of its services under the transferred plans because no issue as to proper compensation was raised in the record. Therefore, security as contemplated by section 406 of the Act is not at issue.

The inapplicability of section 406 security notwithstanding, the Court is mindful that in the context of Preliminary Injunctions, Fed.R.Civ.P. 65(c) requires the "giving of security by the applicant[.]" Thus, the Court must decide the appropriate sum to order as security for this Preliminary Injunction.

As previously referenced, the billing of end users for the use of IWATS services is done directly by AT&T. As part of the billing arrangement between plaintiffs and AT&T, AT&T also has the option of deducting any unpaid end user bills from the RVPP discount/rebate it remits to the customer of record. In sum, AT&T's charges for use of its IWATS services are fully protected under its present billing procedures. As such, the billing of end users and AT&T's income from the IWATS services at issue herein shall not necessarily suffer either discontinuance or diminution as a result of the Inga companies/CCI transfer.

AT&T has demanded a deposit for the transfer of plans from the Inga companies to CCI in an amount equal to one quarter of the Inga companies' annual revenue commitment. This demand does not serve to guide the Court, however, in light of the fact that the Inga companies have long held the plans at issue without being required to post a deposit. It appears, therefore, that while AT&T was billing the end user directly, it was satisfied with the Inga companies' ability to cover any potential liability on the plans. The billing practices have not changed as a result of the transfer of the plans to CCI. Moreover, after the transfer the Inga companies still remain liable for any pre-transfer non-payments and remain jointly and severally liable with CCI for any potential shortfalls in the annual commitment levels under the plans. Indeed, AT&T now has an additional indemnitee on the plans: CCI stands over all post-transfer bad debts or non-payments by end users, and has joint and several responsibility for all shortfalls on the plans' annual commitment levels. Thus, while losing no billing potential as a result of the transfer, AT&T's position vis-a-vis the security of its service use by end users is essentially unchanged.

AT&T has attempted to justify its demand for a deposit totalling one quarter of the annual revenue commitment on the plans by reference to the shortfall and termination fees which ay result from early termination or discontinuance of plans. That position, however, is unconvincing in light of the record vidence that AT&T has in the past been liberal in allowing aggregators to "restructure" their plans so as to roll-over or refinance their billing commitments. In answer to the Court's questions at the hearing in this matter, Mr. Inga set forth ertain methods for restructuring or 'refinancing' by which resellers can and do escape termination and also shortfall charges through renegotiating their plans with AT&T. While plaintiffs' explanations of these methods at the hearing and in their supporting papers lack crystalline clarity, AT&T has failed to convince the Court that there is in fact any serious danger of shortfall and/or termination liability resultant from the ansfer of the plans at issue.

This Preliminary Injunction shall not serve to interrupt AT&T's continued provision of IWATS services to its end users under the plans transferred; nor shall the billing for such services be adversely affected by the transfer of the plans at issue. Therefore, since AT&T faces no foreseeable loss of revenue as a result of the transfer, the Court determines that a bond of one hundred thousand dollars ($100,000.00) is sufficient as security to cover any potential "costs and damages as may be incurred or suffered by [AT&T if it] is found to have been wrongfully enjoined or restrained." Fed.R.Civ.P. 65(c). owever, because the parties have not squarely addressed the issue of security thus far in the record, they shall be permitted to contact the Court to schedule a hearing, on proper notice, wherein additional evidence as to that issue may be presented by the parties.

An appropriate Order accompanies this Letter Opinion.

NICHOLAS H. POLITAN
U.S.D.J.